BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD W. JACOBS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,017
IPC, INC.[1]	)	
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 5, 2011, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded temporary total disability compensation (TTD) commencing on February 8, 2011, and medical treatment with Douglas C. Burton, M.D.

Claimant appeared by his attorney, David A. Slocum of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held April 29, 2011, with attachments, and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent contends that claimant failed to prove that he was injured while working for respondent. Instead, claimant's low back condition arose after claimant had been off work for the weekend. Claimant contends that his low back injury symptoms started on his last day before the

[1] IPC, Inc., aka Cretex Company, Inc.

weekend. Then, after claimant returned to work the next Monday, the condition worsened.

2. Did claimant sustain an accident on January 25, 2011? Claimant and respondent dispute the effects of K.S.A. 2010 Supp. 44-508(d).

3. Did claimant give timely notice of the alleged accident or accidents? In relation to this issue, what is the date of accident in this matter?

4. Did the ALJ err in calculating the TTD due in this matter?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be modified to award weekly TTD benefits in the amount of $498.16, but affirmed in all other regards.

Claimant works for respondent performing heavy construction activities. His job requires repetitive bending, lifting and pulling of heavy objects. During the week of August 16, 2010, claimant noticed tightness in his low back. He completed his work through Thursday, August 19, and went home. Claimant did not work on Friday, August 20, 2010, due to a water main break. Claimant testified that he woke up the morning after he last worked[2] with significant pain in his low back. He returned to work on Monday, August 23, 2010, and tried to do his job, but his back pain was significant enough that he was forced to leave work early. An Affidavit of Cindy Whitley, an employee of respondent, acknowledged that claimant complained of pain on August 23, 2010, and left work early due to back pain. However, claimant advised Ms. Whitley that his problems began on August 22, Sunday, when he tried to get out of bed in the morning. The Affidavit states that claimant denied that he was injured at work.

Claimant sought chiropractic treatment with Edward L. Jackson, D.C., on August 24, 2010. Claimant had been receiving treatment from Dr. Jackson for upper back, bilateral shoulder, neck, mid back, bilateral upper extremity and bilateral hip problems and associated headaches as recently as March 13, 2010. The notes from the August 24, 2010, visit fail to mention claimant's low back. The treatment was, instead, focused again on claimant's other long-term complaints. In fact, the note from August 24, indicated that claimant's mid back was somewhat improved. There was no mention of a work-related incident.

Claimant returned to Dr. Jackson on August 25, 2010. Again, the treatment focused on the long-term problems. The office note from that date indicates that claimant's

[2] As to the date that claimant last worked, that would be August 19, 2010.

headache symptoms are worse in the morning, and his neck pain and mid back pain are worse in the afternoon.[3] Again, claimant's mid-back symptoms are somewhat improved, as is his neck pain. The hip pain remains the same. Dr. Jackson noted that claimant's objective findings were relatively unchanged. Again, there is no mention of the low back or any relation to his job. Claimant was taken off work for three days. The off work note from Dr. Jackson was provided to Ms. Whitley.

Also, on August 25, 2010, claimant proceeded to Bates County Memorial Hospital and underwent x-rays of his lumbar spine. The x-rays showed minimal wedging at L1, minimal disc narrowing at L4-5 consistent with degeneration and osteophyte formation. The tests were performed due to what was noted as pain across the lower back, with James D. Lawrenzi, D.O., as the referring physician. Claimant had been referred to Dr. Lawrenzi by Dr. Jackson. Dr. Lawrenzi's note from August 25, 2010, indicates spasms of the paraspinal muscles in the lumbar spine. The assessment was of a possible herniated or bulging disc. Claimant was given work restrictions, and an MRI was recommended. The August 25 note states that claimant has no history of limb weakness. The note does not mention a work-related accident or injury.

Dr. Lawrenzi's August 30, 2010, note states that claimant's back pain remains. Claimant remained off work. An MRI was recommended and administered on September 1, 2010. The MRI displayed a central and left-sided disc protrusion at L5-S1 with abutment at the S1 nerve root. Claimant underwent a series of epidural injections in the lumbar spine, beginning on October 14, 2010.

The record conflicts as to when claimant awoke with the back pain. Claimant advised Ms. Whitley that his pain started on Sunday, August 22, 2010. At the preliminary hearing, claimant testified that the pain may have started on Friday, August 20, the day claimant did not work due to the water main break.

Claimant applied for and was paid short-term disability compensation from August 23, 2010,[4] to December 10, 2010. Claimant then applied for and was paid unemployment from December 10, 2010, to February 7, 2011. Claimant's original Form K-WC E-1 Application For Hearing (E-1) was filed on October 14, 2010, with an accident date of August 23, 2010, and an injury to his low back. An Amended E-1 was filed on April 21, 2011, claiming a date of accident as a series through August 23, 2010, again to claimant's low back.

Claimant was referred by respondent to Douglas C. Burton, M.D., who examined claimant on January 25, 2011. This examination represents the first authorized medical

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[3] P.H. Trans., Cl. Ex. 1 (Dr. Jackson's note of August 25, 2010.)

[4] Claimant worked on August 23, 2010, but he left work early.

treatment provided to claimant under the Kansas Workers Compensation Act (Act). Dr. Burton diagnosed claimant with two-level degenerative disks at L4-5 and L5-S1 on the left side. Claimant also had left-sided L5-S1 and central L5-S1 disk protrusion. Physical therapy was prescribed with the intent to get claimant into better condition. Dr. Burton opined that claimant's ongoing symptoms are the direct result of the work injury suffered the week of August 16, 2010. The history of having pain on the job, with a worsening of the symptoms over the weekend, was found by Dr. Burton to be credible.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

Claimant provides a history of subtle pain while working, with a worsening of the pain over the weekend while at home. This history was found to be credible by Dr. Burton,

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[5] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2010 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

the authorized treating physician. While it is disturbing that claimant supposedly failed to mention his low back to Dr. Jackson, the chiropractor, it is even more disturbing that the chiropractic notes fail to mention the low back, even while Dr. Jackson was referring claimant to Dr. Lawrenzi for an examination and possible treatment of claimant's low back. Perhaps it was not claimant's memory that was faulty here, but rather the record keeping of the chiropractor? The only real confusion in this record is whether claimant experienced the increased symptoms the morning of August 22 or the morning of August 20. The fact that a laborer, such as claimant, would not be so sophisticated as to understand that a claim for workers compensation could be made after a series of minor injuries is not surprising. For claimant to understand that the subtle pain he experienced the week before was, in fact, an accident and injury, when he talked to Ms. Whitley, is not fatal to his claim.

K.S.A. 2010 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[9]

The undersigned Board Member finds that claimant did suffer personal injury by accident which arose out of and in the course of his employment with respondent.

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[10]

Respondent contends that claimant failed to prove that he suffered an accidental injury on January 25, 2011, the date found by the ALJ, and that claimant failed to provide

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[9] K.S.A. 2010 Supp. 44-508(d).

[10] K.S.A. 2010 Supp. 44-508(d).

timely notice of his alleged accident. Both issues are determined by the date of accident determination of K.S.A. 2010 Supp. 44-508(d). The ludicrous results created by this statute have been well documented by both the Board's decisions and by appellate decisions.

> . . . when legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any terms not expressly included in the specific list.[11]

> It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.[12]

The result of having a date of accident determined to be days, weeks, months or even years after an employee last works for an employer has been argued numerous times since the creation of this statute. Nevertheless, even though claimant received medical treatment over a period of several months, and filed an E-1 on October 14, 2010, the date of accident determination cannot be made based upon those facts. The statute requires that we first look to the actions of the authorized physician. The first authorized physician in this matter was Dr. Burton who examined claimant on January 25, 2011. Dr. Burton gave claimant clear instructions to do only sedentary work, thus satisfying the criteria of K.S.A. 2010 Supp. 44-508(d). This establishes the date of accident as January 25, 2011.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[13]

As claimant had earlier provided respondent with the E-1, the need for additional notice does not exist. Therefore, claimant has proven that he suffered personal injury by accident which arose out of and in the course of his employment with a date of accident on January 25, 2011, with timely notice having been provided for this date of accident.

Respondent contends that the ALJ miscalculated the TTD rate in this matter. The parties stipulated at the preliminary hearing that claimant had an average weekly wage of $747.20.[14] TTD is calculated by first determining the average weekly wage of the claimant on the date of accident. That figure is then multiplied by 66 2/3 percent (.6667) to find the

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[11] *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *State v. Wood*, 231 Kan. 699, 647 P.2d 1327 [1982]).

[12] *Id.* (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).

[13] K.S.A. 44-520.

[14] P.H. Trans. at 4-5.

actual weekly benefit. In this instance, $747.20 x 66 2/3 = $498.16. The award of TTD will be modified to utilize the correct weekly benefit amount.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent, with a date of accident on January 25, 2011. Notice was timely provided. The weekly TTD benefit amount will be adjusted pursuant to the above findings.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 5, 2011, should be, and is hereby, modified to award weekly TTD benefits in the amount of $498.16, but affirmed in all other regards.

IT IS SO ORDERED.

Dated this ____ day of July, 2011.

HONORABLE GARY M. KORTE

c: David A. Slocum, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[15] K.S.A. 44-534a.